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IN THE

Supreme Court of the United States

October Term, 1980
No.

ALICE J. WILLIAMS,
Appellant,
–vs–
ESTHER V. KRUEGER,
Appellee.

ON APPEAL FROM THE
SUPREME COURT
OF MICHIGAN

JURISDICTIONAL STATEMENT
STATE CIVIL CASE

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NATIONAL REPRODUCTIONS CORPORATION, DETROIT, MICHIGAN

QUESTION PRESENTED

DOES A STATE'S RULE OF PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY AUTHORIZING SERVICE OF PROCESS UPON A PERSON'S LIABILITY INSURER ALONE AS THE BASIS FOR A JUDGMENT IMPOSING PERSONAL LIABILITY UPON THAT PERSON?

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JURISDICTIONAL STATEMENT
STATE CIVIL CASE

OPINIONS BELOW

The Opinion of the Michigan Supreme Court, filed on February 3, 1981, the Opinion of the Michigan Court of Appeals, and the Opinion of the Kent County Circuit Court are set out in the Appendix hereto. The decision of the Michigan Supreme Court is reported as *Krueger* v. *Williams*, 410 Mich. 144, 300 N.W.2d 910 (1981). The decision of the Court of Appeals is reported as *Krueger* v. *Williams*, 71 Mich. App. 638, 246 N.W.2d 360 (1976), *aff'd on rehearing*, 75 Mich. App. 1, 254 N.W.2d 625 (1977). The decision of the trial court is unpublished.

JURISDICTION

The decision of the Michigan Supreme Court in this case was filed February 3, 1981 (21a-43a). It upheld against constitutional challenge the validity of a court rule which was construed to authorize service of process upon an individual's liability insurer as the only means of notice necessary to support a personal judgment against that individual. The case was remanded to the trial court for further proceedings. Notice of appeal to the Supreme Court of the United States was filed with the Michigan Supreme Court and the Kent County Circuit Court on or about March 20, 1981, and an Order Staying Proceedings and Waiving Stay Bond was entered on April 6, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and 28 U.S.C. §2101(c). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973); *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514 (1963); *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552 (1951).

CONSTITUTIONAL PROVISIONS AND COURT RULES

U.S. Const. amend. XIV, §1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mich. Const. 1963 art. 1, §17 provides:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

Michigan General Court Rule 105.8 provides:

"The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

STATEMENT OF THE CASE

Esther V. Krueger and Alice J. Williams were involved in an automobile accident on May 7, 1971, in which Krueger suffered injury (Complaint, ¶2). At the time of the accident, both were insured by the Detroit Automobile Inter-Insurance Exchange [hereinafter DAIIE] (Transcript, 12/6/74, pp. 25-27). Following the accident, Krueger negotiated her claim with a representative of DAIIE (Transcript, 12/6/74, pp. 25, 29). The claim representative had no contact with Williams (Transcript, 12/6/74, pp. 37-38; Transcript, 4/4/75, pp. 15-16). In fact, DAIIE's only contact with Williams was a letter

received from her in June or July of 1971 (Transcript, 4/11/75, p. 9).

Failing to settle her claim, Krueger filed suit against Williams in March of 1974 (Complaint). All attempts to locate and personally serve Williams were unsuccessful (Affidavits in Support of Motion for Substituted Service).

A copy of the summons and complaint were sent to Williams' last known address by registered mail, return receipt requested. These were returned unopened, marked "Moved — left no address" (Affidavit of Service on Non-Resident). In addition, copies of the summons and complaint were served upon the Secretary of State, Non-Resident Section, and upon Defendant's liability insurer, DAIIE.

A Special Appearance was entered on behalf of Williams by an attorney for DAIIE who challenged the trial court's jurisdiction over Williams for lack of personal service (Motion and Answer). Krueger's attorneys, in turn, filed a motion to allow substituted service, under Michigan General Court Rule [hereinafter G.C.R. 1963] 105.8[1], upon Defendant by serving her insurer by certified mail, return receipt requested (Motion).

RAISING THE FEDERAL QUESTION

Counsel for DAIIE, appearing specially on behalf of Defendant Williams, opposed Plaintiff's motion as being violative of Defendant's "constitutional rights of due process" (Supplemental Brief). The issue was stated as follows:

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[1]The Committee Notes explaining the Rule establish that it is to be construed to authorize any method of service valid under the due process clause of the Fourteenth Amendment to the United States Constitution. 1 Honigman & Hawkins, Michigan Court Rules Annotated, Rule 105.8, Committee Notes, pp. 111-12.

I.

"IF THE TRIAL COURT ALLOWS PLAINTIFF'S MOTION TO SERVE THE DEFENDANT BY SERVICE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, UPON AAA INSURANCE COMPANY, WOULD SUCH ORDER ALLOWING SUBSTITUTE SERVICE DEPRIVE DEFENDANT OF DUE PROCESS OF LAW BE CONTRARY TO THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BE ALSO CONTRARY TO ARTICLE I, SECTION 17, OF THE MICHIGAN CONSTITUTION OF 1963?"

(Supplemental Brief II).

The trial court denied Plaintiff's motion and dismissed the case without prejudice (1a-6a).

> "The testimony we have received here makes it clear that the agents and employees of the insurance company have not had any contact with the Defendant, Alice J. Williams since 1971; do not know of her whereabouts; and it is clear that service upon the insurance company would not be reasonably calculated to give actual notice to Alice J. Williams.
>
> Therefore, the motion for substituted service upon the insurance company is denied."

(1a).

Plaintiff Krueger took an appeal of right to the Michigan Court of Appeals. The Court of Appeals affirmed the dismissal of the complaint in a published opinion which did not reach the question of whether the trial court abused its discretion in denying Plaintiff's motion for substituted service on Defendant's insurance company under G.C.R. 1963, 105.8 (6a-12a).

On rehearing (13a), the Court of Appeals, in another published opinion, considered the issue it had failed to reach previously (14a-18a). It held that the trial court did not abuse its discretion in denying Plaintiff's motion for substituted service. The Court concluded that substituted service on Defendant's insurance company would be unlikely to give Defendant actual notice of the proceedings and an opportunity to be heard, and it reaffirmed the dismissal of the complaint.

Plaintiff Krueger was granted leave to appeal to the Michigan Supreme Court (19a). The parties were "directed to include among the issues to be briefed whether the trial court erred by refusing to allow plaintiff substituted service of process upon the defendant's liability insurer" (19a).

The Michigan Supreme Court filed its opinion in the instant case and its companion case, *Rodgers* v. *Davis*, on February 3, 1981 (21a-43a). The Court framed the issues for decision in this case as follows:

> "The arguments in the Krueger case involve two issues: 1) will service of process upon a defendant's liability insurer comport with the guarantees of due process of law and enable our courts to exercise jurisdiction, and 2) did the lower court err by not allowing plaintiff to use some method of substituted service of process to serve an absent defendant."

(29a)

The Michigan Supreme Court concluded "that jurisdiction was proper in Michigan courts and that litigation here does not offend the due process rights of defendants" (29a). It further held that the lower courts erred by not allowing substituted service on Defendant's insurance company under G.C.R. 1963, 105.8, upheld the validity of such service against Defendant's due process challenge, and remanded the case for further proceedings.

THE DECISION IS FINAL

Although there are further proceedings to follow in the state courts, the Michigan Supreme Court's decision is final within the meaning of 28 U.S.C. §1257(2). The Michigan Supreme Court's final assertion of state court jurisdiction over Appellant in the face of her constitutional challenge to that jurisdiction is not subject to further review in the subsequent state court proceedings. *Leland* v. *Ford*, 252 Mich. 547, 548, 233 N.W. 410, 411 (1930); *Pierce* v. *Riley*, 81 Mich. App. 39, 43, 264 N.W.2d 110, 113 (1978) ("A conclusion reached in an earlier appeal to the Michigan Supreme Court becomes the law of the case and is not subject to review on appeal from a subsequent trial.") Furthermore, the decision on the federal issue is wholly separate from and independent of the merits of the proceedings to come. Under such circumstances, the decision is ripe for review. *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 548-49, 83 S. Ct. 531, 536, 9 L. Ed. 2d 514, 519 (1963); *Johnson* v. *Muelberger*, 340 U.S. 581, 583, 71 S. Ct. 474, 476, 95 L. Ed. 552, 555 (1951). *See also Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 485, 95 S. Ct. 1029, 1041, 43 L. Ed. 2d 328, 344 (1975); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162, 94 S. Ct. 407, 412, 38 L. Ed. 2d 379, 385 (1973). *See Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12, 97 S. Ct. 2569, 2575 n.12, 53 L. Ed. 2d 683, 692 n.12 (1977).*Cf. The General Council on Finance and Administration, United Methodist Church* v. *California Superior Court*, 439 U.S. 1369, 1371-72, 99 S. Ct. 35, 37, 58 L. Ed. 2d 77, 80 (1978).

Another ground for sustaining this Court's jurisdiction is that refusal to review immediately the decision of the Michigan Supreme Court on the constitutional issue herein raised threatens serious erosion of federal policy — here the due process guarantee of notice prior to an affirmative imposition of liability. If, at trial, Appellant were to prevail on the merits

on the question of liability, the federal issue would be moot, but an erroneous decision on a constitutional issue involving serious public consequences would remain. *Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241, 246 n.6, 94 S. Ct. 2831, 2834 n.6, 41 L. Ed. 2d 730, 735 n.6 (1974); *North Dakota State Board of Pharmacy, supra*, at 159, 94 S. Ct. at 410, 38 L. Ed. 2d at 383. Moreover, reversal of the final decision of the Michigan Supreme Court on the federal issue would preclude further proceedings in the instant case. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558, 83 S. Ct. 520, 522, 9 L. Ed. 2d 523, 526 (1963).

In sum, it is imperative that the judgment in the instant case be treated as final. There is no suggestion that further federal questions will be decided on remand, the federal issue finally decided by the Michigan Supreme Court is separable from, and collateral to, the issues in the later proceedings, and reversal of the final decision of the Michigan Supreme Court on the federal issue would preclude further proceedings in the instant case. *See Shaffer* v. *Heitner, supra*, at 195 n.12, 97 S. Ct. at 2575 n.12, 53 L. Ed. 2d at 692 n.12; *North Dakota State Board of Pharmacy, supra*, at 162, 94 S. Ct. at 412, 38 L. Ed. 2d at 385. *See also National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44, 97 S. Ct. 2205, 2206, 53 L. Ed. 2d 96, 98 (1977).

THE QUESTION IS SUBSTANTIAL

The issue in this appeal is whether a state's rule of procedure violates the due process guarantees of the Fourteenth Amendment to the United States Constitution by authorizing service of process upon an individual's liability insurer as the only means of notice necessary to support a personal judgment against that individual where her whereabouts are neither known nor ascertainable.

The determination of the question herein posed has national implications. At issue is more than the validity of one state's practice. Rather, the focus of inquiry here is upon the constitutional parameters limiting the extent to which any state can dispense with the requirement of a meaningful method of notice prior to the imposition of personal liability upon an individual. The importance of those parameters is underscored by the trend toward defining permissible methods of service to the limits allowed by the United States Constitution. *E.g., Hutchins* v. *Del Rosso,* 116 N.H. 421, 365 A.2d 127, 129 (1976); *Avdel Corporation* v. *Mecure,* 58 N.J. 264, 277 A.2d 207, 209 (1971); *Dobkin* v. *Chapman,* 21 N.Y.2d 490, 236 N.E.2d 451, 458, 289 N.Y.S.2d 161 (1968); *First Wyoming Bank* v. *Trans Mountain Sales & Leasing, Inc.,* 602 P.2d 1219, 1221 (Wyo. 1979).

Furthermore, the import of a decision on the issue presented is not limited to the type of case here involved. Although its primary impact will probably be upon the significant number of automobile personal injury claims filed in state courts, this Court's decision will necessarily affect any action against a missing individual whose liability insurance arguably covers the damages alleged in the complaint. In addition, the principle relied upon by the Michigan Supreme Court (that the carrier is "likely to have an interest" in finding the missing defendant) would justify the type of service allowed by the Michigan Supreme Court upon a much broader category of entities than insurers (e.g., banks, creditors). Clearly, the ramifications of permitting the kind of service authorized in the instant case extend well beyond the present circumstances.

The method of service of process authorized by the Michigan Supreme Court in the instant case is one example of a trend to authorize substituted service of process in actions to impose affirmative personal liability even in the acknow-

ledged absence of any likelihood of actual notice. *See, e.g., Sommers* v. *Gaston,* 295 A.2d 578 (Del. Super. Ct. 1972) (authorizing service of process by registered mail to an address at which it was already determined defendant did not reside); *Manley* v. *Nelson,* 50 Hawaii 484, 443 P.2d 155 (1968), *cert. denied sub. nom. Soszka* v. *Manganaro,* 394 U.S. 573, 89 S. Ct. 1299, 22 L. Ed. 2d 555 (1969) (authorizing service by publication in a Hawaii newspaper after ascertaining that the defendant was not in the state); *Feuchtbaum* v. *Constantini,* 59 N.J. 167, 280 A.2d 161 (1971); *Dobkin* v. *Chapman,* 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). *But see Smith* v. *Commercial Union Assurance Company,* 246 Ga. 50, 268 S.E.2d 632 (1980) (no personal judgment against defendant, nor liability on the part of his insurer, where defendant's whereabouts are unknown).

Courts permitting service of process which is admittedly fictional and unrealistic not only obscure the primary purpose of ensuring that defendants receive notice of pending actions, but also effectively avoid any real limitations imposed by the due process guarantee of notice. The effect of piecemeal authorization of such methods of service of process is a steady erosion of its constitutional purpose. This is apparent from the opinions of the highest courts of the two other states that have upheld service on defendant's insurance carrier as sufficient notice to sustain a personal judgment against the defendant.

In *Dobkin* v. *Chapman, supra,* the New York Court of Appeals authorized plaintiff to serve process on defendant by delivering a copy of the summons to defendant's insurance carrier and by mailing a copy thereof to defendant's last known address (at which it had previously been determined that defendant did not reside). The New York court effectively conceded that, as a practical matter, the authorized method of

service was not expected to give actual notice to defendant. 236 N.E.2d at 458-59.

The court relied on *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), to permit service of process in the absence of any probability of notice to defendants. 236 N.E.2d at 458. Although it recognized the substantial differences between the circumstances of the *Mullane* case and those of the case before it, 236 N.E.2d at 458, the New York court failed to address the effect of those differing circumstances as a factor to be considered in determining the question of adequate notice. (This aspect of *Dobkin* will be further discussed below). Instead, the court held that service on the insurer and mailing to defendant's last known address satisfied the due process requirement of adequate notice, relying on the following findings: (1) defendants were responsible for the inability of plaintiffs to directly serve process because they moved without informing anyone of their whereabouts, *id.* at 459, (*but see Feinstein* v. *Bergner,* 48 N.Y.2d 234, 397 N.E.2d 1161, 1164, 422 N.Y.S.2d 356 (1979) (finding that a potential defendant has no affirmative duty to inform potential plaintiffs of his whereabouts); (2) the insurer was the real party in interest, 236 N.E.2d at 459, (*but see Rush* v. *Savchuck,* 444 U.S. 320, 330-31 & n.20, 100 S. Ct. 571, 62 L. Ed. 2d 516, 526-27 & n.20 (1980) (rejecting the real-party-in-interest status of defendant's insurer); (3) denial of substituted service would be unfair to plaintiffs and harmful to the public interest. 236 N.E.2d at 458-59.

In *Feuchtbaum* v. *Constantini, supra,* the New Jersey Supreme Court permitted service on defendant's insurance carrier and ordinary mail to his last known address where defendant's whereabouts were unknown. 280 A.2d at 168. Following *Dobkin,* the New Jersey court determined the scope of the due process notice guarantee by allegedly balancing the respective interests of the plaintiffs, defendants and the state. *Id.* at 166.

Conceding that the method of service under the circumstances was "far from certain" to provide defendant with any notice of the action, *id.* at 166, the court nevertheless held that service on the insurer was fair to the defendant. As in *Dobkin*, the New Jersey court reasoned that defendant's own behavior (in failing to keep potential plaintiffs posted of his whereabouts) was responsible for depriving him of notice, that the insurer's interests coincided with defendant's interests, and that defendant had an opportunity to seek relief from the judgment against him. *Id.* at 166.

Again as in *Dobkin*, the New Jersey court authorized a method of service which admittedly had no probability of providing notice to defendant. It did so in reliance on *Mullane, supra*, but without accounting for the different legal consequences resulting from the *Mullane* action as opposed to the case before it. As discussed below, principled analysis of the due process right to notice is not possible without considering that crucial difference. The growing trend in the state courts to impose affirmative and potentially unlimited liability in the acknowledged absence of any reasonable probability of notice makes it imperative that this Court finally determine the issue of adequate notice in such actions.

No decision of this Court has addressed the question whether service of process upon a person's liability insurer alone is constitutionally adequate to support a judgment affirmatively imposing personal liability upon the insured. In only three cases has this Court discussed the quality of notice necessary to support a personal judgment, and nothing in those cases provides a definitive answer to the question herein presented.

In *McDonald* v. *Mabee*, 243 U.S. 90, 37 S. Ct. 343, 61 L. Ed. 608 (1917), this Court held that publication in a local newspaper was insufficient notice to sustain a personal judgment against a domiciliary of the forum state who had left the state,

not intending to return. In its analysis, this Court stated that a substitute for personal service must be the method "most likely to reach the defendant . . . if substantial justice is to be done." *McDonald,* 243 U.S. at 92. However, this Court then suggested that the outer limits of sufficient substituted service upon an individual would be service "at the last and usual place of abode." *Id. See* Fed. R. Civ. P. 4(d) (1).

In *Wuchter* v. *Pizzutti,* 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446 (1928), this Court held that a state provision would not pass constitutional muster if it permitted a personal judgment against an individual without requiring some communication to him which would "make it reasonably probable that he will receive actual notice." *Wuchter,* 276 U.S. at 19.

Finally, in *Milliken* v. *Meyer,* 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940), this Court stated in *dicta* (the defendant in that case had received actual notice as the result of the service effected) that the adequacy of notice to sustain a personal judgment would depend upon whether it was "reasonably calculated" to give the defendant actual notice of the proceedings.

Although the foregoing three cases apparently reject any method of service with no reasonable probability of notifying an individual of proceedings seeking to impose personal liability upon him, they provide no definitive answer to the issue under discussion. A significant factor contributing to that uncertainty is the as yet undefined effect of *Mullane* v. *Central Hanover Bank & Trust Company, supra,* upon such proceedings.

In *Mullane,* this Court stated that service by publication was constitutionally sufficient as to beneficiaries of a trust fund whose interests or whereabouts could not be ascertained through the exercise of reasonable diligence. This Court stated that "in the case of persons missing or unknown, em-

ployment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, 339 U.S. at 317. Reasoned analysis of two aspects of the *Mullane* decision demonstrates its inapplicability to actions seeking to impose personal liability upon an individual.

First, the proceedings in *Mullane* did not concern the imposition of liability upon individuals, but rather the foreclosing of rights in certain property. The distinction is significant. A decision concerning property rights is a systemic necessity, whereas the imposition of tort liability is not. Moreover, the impact of a decision foreclosing rights in property is inherently limited, whereas a personal tort judgment is potentially unlimited.

The systemic necessity of the possibility of a decision foreclosing property rights is rooted in the very nature of our society. It is inherent in our system of government that there are certain types of cases in which it is absolutely imperative that a decision concerning the subject matter of the action be possible under *all* circumstances, including the absence of some of the interested parties. A system premised upon private ownership of property would eventually cease to function viably without some means of determining rights in property under any and all circumstances. Similarly, social necessity mandates that certain determinations concerning status (e.g., divorce) be possible in all situations. In such cases, the possibility of some decision is a matter of systemic necessity. The reasoning underlying this Court's decision in the *Mullane* case recognized that fact:

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. ***But the vital interest of the State in bringing any issues as to its fiduciaries to final settlement can be served only if interests or claims of individuals who are outside of***

> *the State can somehow be determined.* A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."

Mullane, 339 U.S. at 113-14 (emphasis added.)[2] Furthermore, in concluding that the absence of any notice to certain of the interested trust beneficiaries was a "justifiable" and "reasonable risk" under the circumstances, this Court relied upon the presence of parties actually notified whose interests in the property were identical to those of the unnotified persons. 339 U.S. at 319. The distinction between the type of case involved in *Mullane,* and personal injury cases has been noted. *E.g., Dobkin* v. *Chapman,* 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); Note, *Civil Procedure — Constitutionality of Constructive Service of Process on Missing Defendants,* 48 N.C.L. Rev. 616, 622 n.30 (1970).

On the other hand, actions seeking to impose affirmative liability upon a defendant are governed by quite different considerations. First, the systemic necessity for a decision under all circumstances is absent. Although both an injured party and the state have an interest in providing a means whereby the former can recover money damages for his injuries, that interest is by no means "vital" in the same sense as the ability to determine interests in property or other matters affecting the very viability of the governmental system.

Moreover, the affirmative nature of the liability imposed in a personal injury action is more momentous in kind and scope than the "foreclosure of rights" regarding particular property or status. Such affirmative liability exposes all of a person's

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[2]The two subsequent notice decisions reaffirming and applying the *Mullane* analysis both involved the disposition of real property. *Schroeder* v. *City of New York,* 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962); *Walker* v. *City of Hutchinson,* 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956).

assets (save those specifically protected) to further judicial action to enforce the default judgment. Thus, the subject matter and the ramifications of the *Mullane* decision were different in kind from cases such as the instant one.

Second, the approval of a "probably futile" method of notification in *Mullane*, if applied to the type of case here involved, conflicts with the requirement imposed in *Wuchter* v. *Pizzutti*, *supra*, that the notification necessary to a tort defendant be "reasonably probable" to give him actual notice of the action. In this regard it should be noted that the latter case was cited with apparent approval by the *Mullane* Court. 339 U.S. at 315. Given that the degree of notice "appropriate to the nature of the case", 339 U.S. at 313, will vary depending upon the nature of the interests involved and the extent and seriousness of the consequences to the party entitled to notice, it is apparent that *Mullane* did not decide the issue presented in the case-at-bar.

The only relatively recent disposition of this Court in any way related to the question here involved was this Court's denial of certiorari in *Manley* v. *Nelson*, 50 Hawaii 484, 443 P.2d 155 (1968), *cert. denied sub nom. Soszka* v. *Manganaro*, 394 U.S. 573, 89 S. Ct. 1299, 22 L. Ed. 2d 555 (1969). That disposition, however, provides no basis for declining to entertain the appeal in the instant case.

The question present in *Nelson* was characterized by the appellant/petitioner as involving a concededly "singular and unprecedented" service by publication provision in a particular state's nonresident motorist statute. *Nelson* v. *Manley*, *supra*, Jurisdictional Statement at 10. No persuasive reason was advanced for this Court to hear an appeal and render a decision whose applicability would be limited to the degree suggested by the appellant/petitioner's characterization of the issue. As indicated above, the trend toward imposing personal liability

in the absence of any reasonably likely notice to the defendant is not a phenomenon restricted to isolated instances.

Furthermore, the appellant/petitioner in *Nelson* failed to bring to this Court's attention the fundamental and inherent distinction (discussed above) between judgments imposing personal liability, *see, e.g., Wuchter* v. *Pizzutti, supra; McDonald* v. *Mabee, supra,* and those involving merely a foreclosure of rights with regard to certain property or status, *see, e.g., Mullane* v. *Central Hanover Bank & Trust Company, supra.* That distinction, although necessary to a well-reasoned determination of the issue, is not so apparent on the face of this Court's prior opinions as to warrant the presumption that this Court considered it in response to the limited legal exposition in the *Nelson* Jurisdictional Statement.

Finally, whatever precedential value is accorded the disposition in *Nelson,* it is undeniable that there has been no general recognition that it answered the question of adequate notice to support a personal judgment. Reference to the commentary discussing that issue and related matters since 1969 suggests that the question posed requires a more definitive answer. *See* Note, *Service of Process by Mail,* 74 Mich. L. Rev. 381 (1975); Note, *Must Service of Process Be Personal in Order to Obtain In Personam Jurisdiction?* 35 Mo. L. Rev. 269 (1970); Note, *Civil Procedure — Constitutionality of Constructive Service of Process on Missing Defendants,* 48 N.C.L. Rev. 616 (1970); Note, *Constitutional Law: The Validity of Service of Process by Mail When There Is No Return Receipt: The Outer Limits of Due Process,* 25 Okla. L. Rev. 566 (1972); Note, *Service by Publication on a Defendant Who Cannot Be Located in California,* 3 U.S.F.L. Rev. 320 (1969).

Despite the absence of a definitive pronouncement from this Court on the question, Appellant submits that the principles established by this Court's prior decisions and the nature of the liability involved compel the conclusion that the type of

notice authorized by the court rule in this case cannot pass constitutional muster. The Michigan Supreme Court clearly erred in holding that G.C.R. 1963, 105.8 constitutionally authorizes service of process upon a person's insurer alone as the basis for a personal judgment against the insured.

A judgment imposing personal liability upon an individual cannot be sustained in the absence of a method of notification rendering it reasonably probable that he will receive actual notice of the proceedings. *Wuchter* v. *Pizzutti, supra.* Although receipt of actual notice is not necessary in this regard, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Company, supra; McDonald* v. *Mabee, supra,* substitutes for personal service must not "let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald,* 243 U.S. at 91.

The "service" of process in the instant case was the purest of fictions. The Michigan Supreme Court conceded that the individual Defendant could not be notified of the pendency of the action against her by any means (32a). The closest the court came to confronting that fact was its assertion that "the carrier is likely to have an interest in finding [her]." (34a)

Appellant's response is twofold. First, the person with the *most* interest in locating the individual Defendant was Plaintiff. If, given the paramount importance of locating Defendant, Plaintiff was unable to do so, there is no reason to expect anyone else to be more successful. Second, the insurer's "interest" in finding the individual would not exist but for the Michigan Supreme Court's decision in the instant case. Thus, under the guise of analysis, the court did no more than state its conclusion, i.e., that because the insurer can be served and compelled to defend an action without the benefit of its best or only witness (the individual Defendant), it therefore has an interest in finding her. The circularity of that argument is seductive until one realizes that Plaintiff, the person with the greatest interest in locating the individual Defendant, has

been unable to do so. Therefore, the net effect of the decision in the instant case was to shift the burden of notifying the individual Defendant (and the consequences of failing to do so) from Plaintiff to Defendant's insurer. There exists no principled reason for so doing.

The insurer was not a party to the instant case. Nor can service of process upon the insurer be justified on the basis that it was the "real party in interest". In a related context, this Court unequivocally rejected the proposition that an individual's due process protection could be circumvented by treating his insurer as having the primary interest in the action. *Rush* v. *Savchuck*, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980).

Nor can service of process upon the insurer be justified on the basis of an agency theory. The Michigan Supreme Court conceded that there existed no express agency to accept service of process (33a), and did not even attempt to fashion an implied agency to do so. Rather, the court cryptically cited the insurer's "representative role" as being "relevent when process cannot otherwise be served upon the insured" (33a). This argument is also circular. The ability of a court to bring the insured before it is analytically prerequisite to the insurer's obligation to defend the action. *See Rush* v. *Savchuck*, 444 U.S. at 430-31. Thus, service of process upon the insurer in the instant case cannot be justified on the basis of any agency or representative capacity.

Furthermore, the type of service of process authorized in the instant case cannot be justified on policy grounds by balancing the respective interests of plaintiffs, defendants and the state.

The plaintiff's interest is always the same: to have a source of recovery. The primary obstacle to insuring such recovery against a missing defendant is, of course, the statute of limita-

tions. The obvious and straightforward manner of avoiding that bar is to provide for the tolling of the statute of limitations during the period that plaintiff cannot, through the exercise of reasonable diligence, identify or locate the defendant. Although involving some inconvenience and uncertainty (given the impairment of evidence through the passage of time), such a compromise is eminently preferable to denying a defendant any trial at all prior to the imposition of considerable personal liability.

The defendant's interest, of course, is to be afforded an opportunity to defend the action prior to imposition of such liability. Regardless of any mitigating measures suggested to reduce the impact of such a judgment, there is no adequate substitute for the defendant's actual presence to defend himself. The contention that the insurer's presence will assure the fairness of the proceedings ignores that the defense at trial in such cases must be conducted in the absence of the defendant, who is the best (and in some cases the only) witness for the defense. Characterizing such a trial as a "fair proceeding" exalts form over substance.

This Court should also note that the justifications customarily advanced in favor of resolving the problem in favor of the plaintiff necessarily *assume* the absent defendant's liability. *See, e.g., Dobkin* v. *Chapman, supra; Feuchtbaum* v. *Constantini, supra;* Note, *Civil Procedure — Constitutionality of Constructive Service on Missing Defendants,* 48 N.C.L. Rev. 616 (1970). Although such a presumption may be appropriate for underscoring the difficulty facing a plaintiff unable to locate a potential defendant, it hardly provides a principled basis for decision of the question under discussion. The fact remains that "due process" is a hollow phrase to a person upon whom large individual liability has been imposed in the absence of an opportunity to defend himself.

The state's interests do not preponderate in favor of either a plaintiff or an absent defendant. It has a self-evident interest in maintaining the integrity of its legal process by insuring that final judgments are rendered only after the fairness of the proceedings is assured. On the other hand, providing injured citizens a source of judicial recovery for tortiously inflicted injuries is also a legitimate concern. However, nothing inherent in either of those considerations renders one predominant.

Moreover, in personal injury cases, the *necessity* for the state to provide a method of determination is absent. *See Mullane; supra.* Thus, the conceptual vehicle for justifying dispensing with a meaningful notice requirement, which is legitimately invoked in property and status cases, is not available here.

In short, neither the plaintiff's interest nor those of the state provide a sufficient principled basis upon which to eliminate the absent defendant's rudimentary right to reasonable notice of an action against him. It is noteworthy in this regard that the Michigan Supreme Court did not even attempt an analytical explanation of its decision.

In the instant case, the Michigan Supreme Court based its decision upon three discernible propositions: (1) under *Mullane* v. *Central Hanover Bank & Trust Company, supra,* service upon the insurer provided a better chance of notifying the individual Defendant than other available alternatives; (2) service upon the insurer was justified because of its "representative role" in the action; (3) the courts of New York and New Jersey have recognized the validity of such actions. None of those grounds provide principled support for the decision in the case-at-bar.

The inapplicability of the *Mullane* test to actions imposing personal liability upon an individual has already been demonstrated. The absence of any systemic necessity for a decision in

such a case and the existence of authority from this Court apparently imposing more stringent notice requirements in such cases, *Wuchter* v. *Pizzutti, supra,* militate strongly against blindly applying the *Mullane* test without reference to the context in which it was promulgated. In short, without pertinent discussion, the Michigan Supreme Court applied the *Mullane* formula to impose affirmative liability upon an individual in a case not involving matters which must always be capable of determination.

The circularity of the "representative role" rationale has been discussed above. Its inclusion as "analysis" in the opinion in the instant case does little more than demonstrate the absence of any legal and principled justification for the decision.

The reasoning in the sister-state authority relied upon by the Michigan Supreme Court is demonstrably deficient with regard to considerations previously discussed. In fact, both *Feuchtbaum* v. *Constantini, supra,* and *Dobkin* v. *Chapman, supra,* illustrate the circularity of the justifications advanced for the type of service allowed here.

In both cases, the respective courts cited *Mullane, supra,* as authorizing service of process upon an insurer where the individual defendant cannot be located. The *Dobkin* court recognized that *Mullane* "involved a situation quite different from that with which we are now concerned", *Dobkin,* 236 N.E. 2d at 458, but seemed untroubled by the distinction. The *Feuchtbaum* court interpreted this Court's rejection of the *in personam/in rem* distinction in *Mullane* as obliterating any pertinent distinction between the foreclosing of rights in property and the affirmative imposition of liability upon an individual. The latter distinction (discussed above) was not addressed in *Feuchtbaum.*

Appellant points out that she does not premise her position on the *in personam/in rem* distinction *per se*, which was properly rejected by this Court in *Mullane*. Indeed, Appellant concurs that such a distinction is not useful for present purposes for two reasons: the vagaries of state law preclude a nationally uniform characterization of actions on that basis; and any rule premised upon such a distinction would turn on considerations not relevant to the factors properly dispositive of the quality of notice appropriate to a given type of case. In contrast, the distinction advanced provides a principled and workable basis for decision because it is grounded on considerations which focus upon the nature of the consequences of the action rather than upon the label attached thereto.

In short, neither *Dobkin* nor *Feuchtbaum* provide any principled justification for applying the *Mullane* notice formula concerning missing trust beneficiaries to an action seeking to impose personal liability upon an individual.

A second flaw common to both *Dobkin* and *Feuchtbaum* is the skewed and incomplete nature of the alleged balancing of interests upon which they base their respective results. With regard to the state's interest, neither case even pays lip service to the interest in maintaining the integrity of the state's judicial service by insuring the actual and practical fairness of proceedings culminating in personal liability upon an individual.

With regard to the defendant's interest, the analysis in those cases was skewed in two ways. First, neither opinion confronted the critical interest of a defendant in being present to testify in his own behalf and thus providing the best (and possibly only) defense witness. Second, both opinions premised their discussion upon the assumptions that: (1) defendants in such cases were involved in (and, therefore, have knowledge of) the accidents in question; and (2) defendants in such cases were factually and legally responsible for the accident.

Resolving such matters against the absent party hardly provides a principled basis for determining whether an action against him may proceed in the absence of any meaningful notice to him.

Operating upon the foregoing assumptions, the discussions in *Dobkin* and *Feuchtbaum* regarding the factor termed "fairness to the defendant" are no more than polemics against presumably liable persons who are presumably at least negligent in not maintaining proper contact with their insurers, the authorities, or the presumably injured plaintiff. In short, both the *Dobkin* and *Feuchtbauim* courts appear to have had their respective judicial thumbs on the scales of justice during their "balancing" of the pertinent interests.

Both courts exhibit a preoccupation with plaintiffs' interests at the expense of any serious consideration of more pertinent factors. Such an approach demonstrates a shift in focus away from analysis of the ramifications of, and justifications for, dispensing with a meaningful notice requirement in actions imposing personal liability upon an individual. Both courts focused almost exclusively upon plaintiff's situation. Given that the constitutional right involved is defendant's, such an analysis fails to address, much less answer, the central question involved. *Cf. Rush* v. *Savchuck,* 444 U.S. at 332.

A third conceptual flaw common to those cases is that both *Feuchtbaum, see White* v. *Austin,* 172 N.J. Super. 451, 412 A.2d 829 (1980), and *Dobkin* were ultimately premised upon their perception of the insurer as the "real party in interest". As has already been pointed out, this Court recently rejected the substitution of the insurer's interest for that of the individual for purposes of due process analysis. *Rush* v. *Savchuck, supra.*

Finally, both *Dobkin* and *Feuchtbaum* provide no satisfactory answer to the objection that an insurer has no "duty to defend" its insured until he is constitutionally brought before a

court with authority to enter a judgment against him. Neither those cases nor the instant one could have yielded their respective results without logically inverting the relationship between the insurer's obligations and the prerequisites thereto. *See Rush* v. *Savchuck, supra.*

The constitutional validity of the type of service authorized in the instant case is an issue not yet decided by this Court. The distinctions between the nature of the action here involved and the one before this Court in *Mullane* v. *Central Hanover Bank & Trust Company, supra,* preclude the blind application of the latter case to the instant one. Consideration of the prior decisions of this Court concerning the quality of notice required for a personal judgment and of the factors pertinent to that question demonstrates the inadequacy of the service of process approved in the case-at-bar. Those state court decisions reaching an opposite conclusion are bereft of any principled justification for their results.

CONCLUSION

This Court should summarily reverse the decision of the Michigan Supreme Court and remand this case to that Court with instructions to affirm the trial court's dismissal of this action.

Alternatively, this Court should accept the case for plenary review either as an appeal or, pursuant to 28 U.S.C. §2103, as a petition for certiorari granted.

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